IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 22, 2008

STATE OF TENNESSEE v. JOHNNY L. MCGOWAN, JR.

Appeal from the Criminal Court for Davidson County
No. 2003-C-2005 J. Randall Wyatt, Jr., Judge

No. M2007-02681-CCA-R3-CO - Filed August 5, 2008

The petitioner, Johnny L. McGowan, Jr., pleaded guilty in the Davidson County Criminal Court to one count of aggravated assault. He received a sentence of eight years, to be served consecutively to the sentence he was already serving in the Department of Correction. Thereafter, he filed a petition for writ of error coram nobis alleging that newly discovered evidence could have affected the outcome of his case. The trial court dismissed the petition as time-barred. The defendant appeals the dismissal, alleging that the trial court erred by "ignoring the mandatory hearing requirement" on the issues raised by the petition for a writ of error coram nobis, that the trial court erred by not appointing counsel to represent the petitioner, and that due process principles precluded the summary dismissal of the petition when the allegations could be proven upon an evidentiary hearing. We affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Johnny L. McGowan, Jr., Mountain City, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Lisa Naylor, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On December 31, 2002, the petitioner escaped from his cell at Riverbend Maximum Security Institution, broke a leg off of a table located in his cell pod, and used the table leg to assault a prison guard, seriously injuring the guard's arm. The petitioner was indicted by the Davidson County Grand Jury for attempted second degree murder, *see* T.C.A. § 39-12-101, -210 (1997), and two counts of aggravated assault by use of a deadly weapon, *see id.* § 39-13-102. On September 23, 2005, the petitioner pleaded guilty to one count of aggravated assault and accepted a sentence of

eight years as a Range III offender, to be served consecutively to the sentence he was then serving in the Department of Correction (TDOC).

On September 21, 2007, the petitioner filed a petition for a writ of error coram nobis alleging that newly discovered evidence could have affected the outcome of his case. Specifically, the petitioner claimed that TDOC investigator Jason Woodall provided false testimony to the Davidson County Grand Jury, which testimony contradicted the findings of an Internal Affairs Investigative Report produced by TDOC. According to the petitioner, the TDOC report established that the offense could not have occurred as alleged by Woodall. On October 23, 2007, the trial court dismissed the petition because it was filed beyond the one-year statute of limitations. Furthermore, the trial court found that "since the Petitioner has failed to present any newly discovered evidence, a hearing on the merits of the Petition is not warranted."

The defendant filed an appeal on November 1, 2007, alleging that the trial court erred by "ignoring the mandatory hearing requirement" on the issues raised by the petition for the writ of error coram nobis, that the trial court erred by not appointing counsel, and that due process principles precluded the summary dismissal of the petition for writ of error coram nobis when the allegations could be proven upon an evidentiary hearing. The State argues that the petition for a writ of error coram nobis was properly dismissed.

A writ of error coram nobis is an "extraordinary procedural remedy," filling only a "slight gap into which few cases fall." *State v. Mixon*, 983 S.W.2d 661, 672 (Tenn. 1999) (citation omitted).

> Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

T.C.A. § 40-26-105(b) (2006); *see State v. Vasques,* 221 S.W.3d 514, 525 (Tenn. 2007). Our supreme court has established the procedure for considering a coram nobis claim:

> [I]n a coram nobis proceeding, the trial judge must first consider the newly discovered evidence and be "reasonably well satisfied" with its veracity. If the defendant is "without fault" in the sense that the exercise of reasonable diligence would not have led to a timely discovery of the new information, the trial judge must then consider both the evidence at trial and that offered at the coram nobis proceeding in order to determine whether the new evidence may have led to a different result. [The court then determines] "whether a reasonable basis exists for concluding that had the evidence been

> presented at trial, the result of the proceedings might have been different."

Vasques, 221 S.W.3d at 527. The decision to grant or deny a petition for writ of error coram nobis rests within the sound discretion of the trial court. T.C.A. § 40-26-105; *State v. Hart*, 911 S.W.2d 371, 375 (Tenn. Crim. App. 1998).

Our supreme court recently held that to be successful on a petition for a writ of error coram nobis, "the standard to be applied is whether the new evidence, if presented to the jury, may have resulted in a different outcome." *Vasques*, 221 S.W.3d at 526.

"The writ of error [coram nobis] may be had within one (1) year after the judgment becomes final by petition presented to the judge at chambers or in open court, who may order it to operate as a supersedeas or not." T.C.A. § 27-7-103 (2000); *see Mixon*, 983 S.W.2d at 670 (holding that a petition for a writ of error coram nobis is untimely unless it is brought within one year of the entry of the trial court's "final," or last, order; the time for filing is not extended by the pursuit of a timely direct appeal). Principles of due process of law, however, may preclude the use of the statute of limitations to bar a claim in coram nobis. *Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001). "'[B]efore a state may terminate a claim for failure to comply with procedural requirements such as statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.'" *Id.* at 102 (quoting *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992)). Thus, principles of due process may intercede when, "under the circumstances of a particular case, application of the statute [of limitations] may not afford a reasonable opportunity to have the claimed issue heard and decided." *Burford*, 845 S.W.2d at 208.

In the present case, the one-year statute of limitations period expired in 2006. Accordingly, the claim for a writ of error coram nobis is barred unless the petitioner was not afforded a reasonable opportunity to present the claim before the limitations period ran. Although the petitioner bore the burden of proving his claims, the record does not establish when the petitioner received the TDOC report which is the basis of his coram nobis claim. As a result, meaningful assessment of whether he had a reasonable opportunity to present the claim is impossible. We hold that the trial court did not abuse its discretion in finding that the petitioner had such an opportunity. Moreover, the petition does not bespeak a viable claim of a due process tolling of the statute of limitations.

As for the petitioner's other arguments, we briefly note that the trial court found that "since the Petitioner has failed to present any newly discovered evidence, a hearing on the merits of the Petition is not warranted." "Similar to habeas corpus hearings, coram nobis evidentiary hearings are not mandated by statute in every case as the petitioner argues." *Richard Hale Austin v. State*, No. W2005-02591-CCA-R3-CO, slip op. at 6 (Tenn. Crim. App., Jackson, Dec. 13, 2006). A petition of either type "'may be dismissed without a hearing, and without the appointment of counsel for a hearing'" if the petition does not allege facts showing that the petitioner is entitled to relief. *Id.* (quoting *State ex rel. Edmondson v. Henderson*, 220 Tenn. 605, 609, 421 S.W.2d 635, 636 (Tenn.

1967)). Regardless of the statute of limitation issue, the denial of a hearing and the appointment of counsel in this instance was proper.

Accordingly, the trial court's dismissal is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE